82-1849

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1982

LEONARD B. HEBERT, JR. & CO., INC.;
LANDIS CONSTRUCTION COMPANY, INC.;
PRATT FARNSWORTH, INC.;
BOH BROS. CONSTRUCTION CO., INC.;
AMERICAN GULF ENTERPRISES, INC.;
GURTLER-HEBERT & CO., INC.;
PITTMAN CONSTRUCTION COMPANY, INC.;
BARTLEY INCORPORATED;
BINNINGS CONSTRUCTION CO., INC.;
AND GERVAIS FAVROT COMPANY, INC.,

Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM E. HESTER III,
(COUNSEL OF RECORD)
CHARLES H. HOLLIS
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162

COUNSEL FOR THE PETITIONERS

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On May 12, 1983, the Petitioners filed a Petition for a Writ of Certiorari seeking review of the decision of the U.S. Court of Appeals for the Fifth Circuit in

National Labor Relations Board v. Leonard B. Hebert, Jr., & Co., Inc., 696 F.2d 1120 (5th Cir. 1983). On June 15, 1983, the Respondent filed a Brief in Opposition. Pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, the Petitioners file this Reply Brief to Respondent's Brief in Opposition.

ARGUMENT

The central issue in this case is whether a union may establish an employer's duty to respond to a union request for information concerning matters entirely outside the central core bargaining issues such as pay, benefits, and working conditions, by demonstrating the relevancy of its request for information to the union's duties as collective bargaining agent for the first time at a hearing long after the union's request was first made.

In the instant case, the Union requested certain information of the Petitioners by letters dated between January 18 and February 12, 1980.[1/] The letters requested information concerning the Petitioners' relationships, if any, to certain other companies.[2/] Nearly all of the Petitioners responded in writing to the Union, asking the basis of the Union's request for information. The Union then wrote back to the Petitioners and stated that it was unable to supply any further information concerning its

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1/ Leonard B. Hebert, Jr., & Co., Inc., 259 NLRB No. 126 n.3 (1981), reproduced in Appendix "D" to Petitioners' Petition For A Writ Of Certiorari.

2/ The Respondent takes issue (Res. 11, n. 6) with the Petitioners' assertion that "[t]he Board itself, by inference, has held that letters similar to those sent by the Union in the instant case are not themselves sufficient to establish the

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2/ (CONTINUED)

degree of relevancy required to trigger a response from an employer. Doubarn Sheet Metal Inc., 243 NLRB 821, 824 n. 13 (1979)."

The Petitioners would agree with the Respondent's contention (Res. 11, n.6) that "the facts in Doubarn, where the Board upheld an information request, are almost 'identical' to those in this case." However, one important fact sets the instant case apart from Doubarn and therefore requires reversal of the Circuit Court's decision:

> The parties [in Doubarn] had entered a stipulation stating that the Union had received information regarding possible contract violations. Nothing contained within the stipulation challenges the bona fides of the Union's information." (emphasis added).

The Board then wrote that:

> [i]n Curtiss-Wright Corporation, 145 NLRB 152, 157 (1963), the Board found that a union had 'good cause' to challenge a company's handling of nonunit administrative employees and was therefore entitled to certain information about those employees. In N.L.R.B. v. Rockwell-Standard Corporation, 410 F.2d 953 (6th Cir. 1969), the court found that a union was entitled to information about nonunit employees because the union had 'reasonable grounds' to question

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reasons for requesting the information from the Petitioners. Inasmuch as the Union had failed to establish the basis of its request and they had no independent knowledge of the reasons for the Union's requests, the Petitioners did not supply answers to the Union's inquiries.

Thereafter, the Union filed an unfair labor practice charge with the 15th Regional Office of the National Labor Relations Board, and a Complaint was issued against the Petitioners. It should be noted that, at the time of the issuance

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2/ (CONTINUED)

> a company's handling of nonunit work. Whether the initial burden as [sic] defined as one of showing 'good cause' or 'reasonable grounds,' the facts set forth in the stipulation establish that the Union has met that burden.

Id. (emphasis added.)

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of the NLRB's Complaint, the Petitioners still had no knowledge of the Union's reasons for requesting the information it apparently still seeks beyond the boiler-plate statements contained in the Union's initial letter requesting information from the Petitioners.

Subsequent to the Regional Director's issuance of a Complaint against the Petitioners, a hearing was conducted before an Administrative Law Judge at which time the Union's witnesses testified

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2/ (CONTINUED)

The parties in the instant case entered into no such stipulation concerning "information received" by the Union concerning contract violations. In fact, as noted earlier, the Union failed to provide any such information to the Petitioners despite their written request that the Union do so. It is the absence of such a stipulation in the instant case, and the Board's explicit reliance on the stipulation in Doubarn as a basis of a finding of a violation, that requires a reversal of the Circuit Court's decision in the case at bar.

as to the reasons the Union allegedly held for seeking the information from the contractors.[3/] This was the first time that these reasons for seeking the information were made known to the contractors. It is crucial to note that until this time, the Petitioners were absolutely unaware of the Union's alleged rationale for requesting the information it seeks from the Petitioners.

It is the Petitioners' position that the vague, general, boilerplate reasons advanced by the Union in its intitial letter to the Petitioners were legally insufficient to establish the Union's admitted burden of demonstrating that it is entitled to the information which is not presumptively relevant to its duties as collective bargaining agent.

3/ It is the Petitioners' position that the Union's reasons for seeking the information failed to establish a duty on the part of the Petitioners to respond to the Union's request. (Pet. 31-43.)

To establish the employer's duty to respond to its request the Union must first demonstrate the specific basis of its request, beyond a mere suspicion or surmise, that the collective bargaining agreement has been violated. San Diego Newspaper Guild v. N.L.R.B., 548 F.2d 863, 868 (9th Cir. 1977). This duty must be established before the Petitioners' duty to supply the requested information ever arises. There simply can be no violation of the National Labor Relations Act as charged by the Complaint in this case until the Union has first shown that the employer had a duty to respond. Because the Union could not have demonstrated that a duty to respond existed until after the Complaint was issued in this case, and in fact, until the Union's witnesses testified at the hearing before the Administrative Law Judge, it is clear that the decisions of the Administrative Law

Judge, the Board, and the Fifth Circuit Court of Appeals are incorrect because they are based on consideration of evidence presented for the first time at the hearing before the Administrative Law Judge to show a duty on the part of the Petitioners to respond to the Union's request.

It is absolutely astounding that the Solicitor General's brief on behalf of the National Labor Relations Board completely fails to confront this central issue. This is, however, not surprising as the National Labor Relations Board skirted this same issue in its brief and argument before the Fifth Circuit Court of Appeals. Similarly, the Fifth Circuit Court of Appeals ignored the obvious sequence of events in this case by considering the testimony of the Union's witnesses, which was advanced for the first time at the trial before the Administrative Law Judge,

in finding a duty on the part of the Petitioners to respond to the Union's request for information which was made more than a year before the hearing took place.

If the Circuit Court of Appeal's decision is allowed to stand in this case, any time a union makes a request for information from an employer, no matter how unconnected the information sought is to the union's duties as collective bargaining agent, an employer will be required by the National Labor Relations Act to provide the requested information at the time of the union's request, despite the fact that the required showing of relevancy[4/] had not yet been made, out of fear that the union might

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4/ Atlas Metal Parts Co., Inc. v. N.L.R.B., 660 F.2d 304, 310-311 (7th Cir. 1981); Soule Glass & Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1092-1100 (1st

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demonstrate relevancy later at a hearing.[5/] This procedure will reduce the employer's right to refuse to release to the union information which is not presumptively relevant to the union's duties as collective bargaining agent to "a game of blind man's bluff," a scenario which has been rejected by this Court,

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4/ (CONTINUED)

Cir. 1981); N.L.R.B. v. Temple-Eastex, Inc., 579 F.2d 932, 937, n. 1 (5th Cir. 1978); N.L.R.B. v. Western Electric, Inc., 559 F.2d 1131, 1133 (8th Cir. 1977); San Diego Newspaper Guild v. N.L.R.B., 548 F.2d 863, 867 (9th Cir. 1977); N.L.R.B. v. Rockwell-Standard Corp., Trans. & Axle Div., 410 F.2d 953, 957 (6th Cir. 1969); Prudential Insurance Co. v. N.L.R.B., 412 F.2d 77, 84 (2nd Cir. 1969), cert. denied, 369 U.S. 928 (1969); United Furniture Workers v. N.L.R.B., 388 F.2d 880, 982 (4th Cir. 1967); Curtiss-Wright Corp. v. N.L.R.B., 347 F.2d 61, 68-69 (3rd Cir. 1965).

5/ This is, in summary form, precisely what occurred in the instant case.

N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 438 n.8 (1967) quoting Fafnir Bearing Co. v. N.L.R.B., 362 F.2d 716 (2nd Cir. 1966), and be in direct conflict with the Ninth Circuit's decisions holding that a requesting party must first show the relevancy of the request before any duty to provide the requested information accrues. San Diego Newspaper Guild v. NLRB, 548 F.2d 863 (9th Cir. 1977); NLRB v. Associated General Contractor, 633 F.2d 766 (9th Cir. 1980) cert. denied 452 U.S. 915 (1981).

If the Fifth Circuit's decision is not reversed, any union will have absolutely unlimited access to whatever information it wants from an employer by providing no more specific reasons for its request than the boilerplate recital that was provided in this case in the letters directed by the Union to the Petitioners.

It is earnestly hoped that the Court will grant the Petitioners' Petition for Writ of Certiorari so that the very important practical problem created by the Circuit Court's decision may be corrected.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted, this 7th day of July, 1983.

WILLIAM E. HESTER III
(COUNSEL OF RECORD)

CHARLES H. HOLLIS
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162

COUNSEL FOR THE PETITIONERS

C E R T I F I C A T E

I, William E. Hester III, certify that three copies of the above and foregoing Reply Brief of Petitioners have been served this 7th day of July, 1983, by United States mail, upon:

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Office of the General Counsel
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

and

Mr. Rex E. Lee
Solicitor General of
the United States
U. S. Department of Justice
Washington, D.C. 20530